IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 937 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ARVIND C SHAH

Versus

BACHUBHAI V THAKKAR

Appearance:

MR SURESH M SHAH for Petitioner

NOTICE SERVED for Respondent No. 1

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 15/09/2000

ORAL JUDGEMENT

The petitioner is the original defendant, against whom the respondent herein has filed a suit, being Regular Civil Suit No.50 of 1979, in the Court of Civil Judge (S.D.), Bhavnagar. The aforesaid suit was filed for getting a decree for possession of the suit premises. The respondent-plaintiff is the owner of the premises "Krishna Nivas", situated in Jamadar Sheri, in the City of Bhavnagar. Part of the suit premises was occupied by the defendant-tenant at a monthly rent of Rs.45/-. Over and above the rent, the tenant was required to pay electricity charges, house tax, etc. It is the case of the plaintiff that the defendant-tenant was in arrears of

rent from 1.7.1976 and in spite of the demand notice dated 13.2.1978, he has not paid any arrears of rent. It is also his case that the defendant has transferred and sub-let suit premises to one Kantilal Kuberdas Bhatti for the purpose of doing business of Hair Cutting Saloon and the defendant is recovering Rs.95/- from him. Therefore, on the aforesaid two grounds, i.e. arrears of rent as well as on the ground of sub-letting, the aforesaid suit for possession was filed.

The defendant appeared in the suit and denied the aforesaid suit on various grounds. He also took dispute of standard rent in his Written Statement Exhibit 14. The defendant also took the plea that the Manager of the plaintiff Bachubhai Vithaldas Thakker has no right to file the suit as he was having no power-of-attorney with him. He denied the claim of arrears of rent on the ground that for the arrears of rent, Money Order was sent to Bombay on 24.11.1977, but it was not accepted by the landlord. Previously also he sent a Money Order which was not accepted by the landlord. The defendant has also taken the plea in his written statement that the defendant is doing Hair Cutting business in the suit premises and is paying salary to Kantilal Kuberdas Bhatti for helping him in the business. On the aforesaid ground, the claim in the said suit was denied by the defendant.

The trial court thereafter framed various issues and after recording the evidence of the parties, came to the conclusion that the defendant is found to be in arrears of rent for more than six months and he has neglected to pay the rent. The question of sub-letting was also decided in favour of the plaintiff. The trial court fixed the standard rent at Rs.45/- per month and ultimately, by the judgment and decree dated 1st August, 1983, decreed the suit for possession and also awarded decree of Rs.945/- in favour of the plaintiff towards arrears of rent.

The said decree was challenged by the defendant before the District Court at Bhavnagar by preferring Regular Civil Appeal No.76 of 1984. The said appeal was heard by the Joint District Judge, Bhavnagar, who, ultimately, by his order dated 20th July, 1987, dismissed the same with costs. The unsuccessful defendant has ultimately approached this Court by way of this Revision Application by invoking Section 29(2) of the Bombay Rent Act.

Even though the respondent is served, he has not

appeared in the present proceedings and, therefore, the revision application is required to be decided in his absence.

At the time of hearing of this Revision Application, it was argued by Mr.Shah for the petitioner-tenant that in the instant case, an application was given under Exhibit 15 by the plaintiff-landlord, praying to the Court that since the defendant has not paid rent since a considerable period and is in arrears of large amount, he may be directed to deposit the rent within the stipulated time and in default, his defence may be struck out. The Court has fixed the aforesaid application for hearing and thereafter, by Exhibit 21, the defendant gave his reply and prayed that initially the rent was Rs.30/- per month, which was subsequently increased to Rs.45/- per month by the landlord. He, therefore, requested for fixing interim rent. He also stated that whatever rent is fixed, he is ready to pay. Thereafter, common order was passed below Exhibits 15 and 21 and the learned 6th Joint Civil Judge (J.D.), Bhavnagar by his order dated 4.9.1982, fixed the interim rent at Rs.45/-. It was stated in the order that on failure to comply with the said order, the defendant's right to defence will be struck out. Thereafter, by an order below Exhibit 25, dated 15.10.1982, the learned Judge passed an order to the effect that since the defendant has not complied with the order below Exhibit 21, even though sufficient time was given to deposit the rent and since he has not made any application asking extension of time, his defence to the aforesaid suit is struck out. Ultimately, after recording the evidence of the plaintiff, the trial court passed the decree on both the counts as stated above. The trial court ultimately decreed the suit on the ground of arrears of rent and on the ground of sub-letting. The appellate court also dismissed the appeal filed by the plaintiff.

It is the say of Mr.Shah that the trial court has committed an error of law in passing an order of striking out the defence of the defendant as according to him, originally the composite order was passed below Exhibits 15 and 21 by which the trial court had fixed the interim rent as Rs.45/-. According to him, the court could not have straight away passed an order to strike out the defence below the aforesaid applications Exhibits 15 and 21. In his submission, before passing the order of striking out the defence at Exhibit 25, the Court was supposed to issue fresh notice, asking from the defendant explanation for not depositing the amount.

Mr.Shah relied on a Division Bench decision of this Court in Harkisondas Chunilal Chokshi v. Prabhavatiben, wd/o. Shah Ambalal Laxmichand, XIV GLR 438, wherein, in paragraphs 17 and 19, the Division Bench has held as under :-

> "... 17. The question which we must next consider is as to at what stage such a direction can be given by the court and further whether the tenant must be given a clear indication in advance that the court would exercise the power available to it under this part of sub-sec. (4) in case of non-compliance with its orders. Now so far as the first of these two aspects is concerned, it appears to us that an order under this part of sub-sec. (4) can be made by the court either at the time at which it makes orders specified in the earlier parts of the said sub-section or it may make it even later, if it finds that its order has not been complied with, by allowing the tenant simultaneously further time to comply with it. To give an illustration, if the court has directed that the amount which it has ordered the tenant to deposit in the court should be deposited on or before the fifteenth day of a given month, it may at the time of the passing of that order further issue direction under the last part of sub-sec. (4) and provide that if the tenant fails to comply with such an order within the time prescribed, he shall not be entitled to appear in and defend the suit except with the leave of the court. It is open to the court, however, not to issue such a direction at that stage. If during the time allowed by the court, the tenant is unable to make the deposit and approaches the court for extension of time, it would be open to the court to issue the direction contemplated by the last part of sub-sec. (4) at that stage and order that if the tenant fails to comply with the order of deposit within the extended time allowed by it, he shall not be entitled to appear in or defend the suit except with the leave of the court. The second aspect of the question which we have posed above is,

however, more important. It would clearly appear from the foregoing discussion that the consequence that the tenant shall not be entitled to defend the suit except with the leave of the court is a consequence which follows upon the direction issued by the court in that behalf which direction is issued to secure compliance with its order. The direction must, therefore, be issued at a point of time earlier than the consequence. In other words, the tenant must have notice in advance that if he fails to comply with the order made by the court within the time allowed by it, he shall not be entitled to appear in and defend the suit except with the leave of the court. There must be a clear prior indication that his right to appear in and defend the suit would not be exercisable by him except with the leave of the court in case he fails to comply with the order of the court within the time limited by it. The right to defend is a valuable right under our system of administration of justice. It is also an essential and integral postulate of the rule of law by which we are governed. It would be idle to contend that that right could be taken away by the court unless the tenant is told in advance that the consequence as set out in the last part of sub-sec. (4) will follow as a penalty in the event of non-compliance with the order of the court. A similar view has been taken by Sarela J. in Pirubhai Ramjibhai v. Trikamlal (X G.L.R. 747) and we are in agreement with the view expressed by him .... "

" ... 19. We might also observe that proper procedure which would be required to be followed in issuing a direction under the last part of sub-sec. (4) would be for the court to state in its order in the first instance that unless the tenant complies with the order passed by it within the time allowed by it, he shall not be entitled to appear in or defend the suit except with the leave of the court. In case of non-compliance with such order, it would be open to the tenant to apply to the court for leave to appear in and defend the

> suit, and in that application, the tenant may show cause as to why he could not comply with the order of the court and pray that an unconditional order granting leave to defend should be passed. The court, after hearing both the sides, will have to determine inter alia, whether having regard to the circumstances of the case, non-compliance with the order of the court was wilful or contumacious or was for reasons beyond the control of the tenant or for any other sufficient cause. It may then pass any of the following orders (i) it may refuse leave to defend; (ii) it may grant leave to defend unconditionally or (iii) it may grant leave to defend on such reasonable terms and conditions as it may specify including the condition that the amount should be deposited by the tenant in the Court before entering upon defence. In considering the question as to which of the orders should be passed, the Court would have to exercise its judicial discretion having regard to the facts and circumstances of each case .... "

According to Mr.Shah, when the second order was passed at Exhibit 25, straight away before passing the order, opportunity was required to be given to the defendant by asking him as to why he has not complied with the order in question and his explanation was required to be sought for. In his submission, therefore, the order is in the nature of penalty. An opportunity was required to be given to the defendant asking an explanation from him as to why the amount was not deposited. The tenant must have notice in advance. If he fails to comply with the order made by the Court within the time prescribed, he shall not be entitled to appear and to defend the suit except with the leave of the Court. Therefore, the impugned order is illegal and the order of striking out his defence was clearly bad in law.

Mr.Shah has further relied upon the decision of the Honourable Supreme Court in Miss Santosh Mehta v. Om Parkash and others, AIR 1980 SC 1664. Under the provisions of the Delhi Rent Control Act, regarding striking out defence, the Supreme Court has said in the said case that failure to pay rent coupled with defiance or gross negligence of tenant must exist. The Supreme Court further held as under :-

> "... Striking out defence of a tenant is a harsh extreme and having regard to the benign scheme of the legislation this drastic power is meant for use in grossly recalcitrant situations where a tenant is guilty of disregard in paying rent. That is why a discretion is vested, not a mandate imposed. Striking out a party's defence is an exceptional step, not a routine visitation of a punitive extreme following upon a mere failure to pay rent. First of all, there must be failure to pay rent which, in the context, indicates wilful failure, deliberate default or volitional non-performance. Secondly the Section provides no automatic weapon but prescribes a wise discretion, inscribes no mechanical consequence but invests a power to overcome intransigence. Thus, if a tenant fails or refuses to pay or deposit rent and the court discerns a mood of defiance or gross neglect, the tenant may forfeit his right to be heard in defence. It will be noted that S.15(7) is not couched in mandatory language. It uses the word "May". There is no indication whatsoever in the Act to show that the exercise of the power of striking out of the defence under S. 15(7) was imperative whenever the tenant failed to deposit or pay any amount as required by S. 15. The provisions contained in S.15(7) of the Act are directory and not mandatory. The effect of striking out of the defence under S.15(7) is that the tenant is deprived of the protection given by S. 14 and, therefore, the powers under S.15(7) must be exercised with due circumspection .... "

In his submission, therefore, before passing order below Exhibit 25, by which his defence was struck out, one more opportunity was required to be given to the tenant as to why he could not comply with the earlier direction and there could not be an order straight away simply because the earlier order was not followed, by which he was asked to deposit certain amount towards arrears of rent.

Mr.Shah has also further argued that in any case, opportunity to cross-examine the plaintiff's witnesses was required to be given. He further submitted that even in case of striking out the defence, the tenant is still

entitled to cross-examine the witnesses of the plaintiff.

I have heard the arguments of Mr.Shah. So far as the first point is concerned, it is no doubt true that one more opportunity was required to be given before passing the order below Exhibit 25 in the suit striking out the defence of the defendant, by which on the ground of non-compliance with the earlier order, below Exhibits 15 and 21, subsequently straight away an order could not have been passed. Before passing the impugned order at Exhibit 25, striking out the defence, at least the tenant was required to be heard on the ground as to why he has not complied with the earlier direction and as to why his defence should not be struck out. I, therefore, find substance in the argument of Mr.Shah on this point.

So far as the second point of not allowing the defendant to cross-examine the plaintiff's witnesses is concerned, it has been observed by the learned trial Judge in paragraph 5 of the judgment that by order below Exhibit 43, the defendant was not allowed to cross-examine the witnesses of the plaintiff by an order dated 15.7.1983. Now, it is not clear whether because the defendant's advocate was not present for cross-examination, he was not subsequently allowed to cross-examine the witnesses or because of the order passed under Section 11(4) of the Bombay Rent Act, he was not allowed to cross-examine the witnesses. But, in any case, in the interest of justice, the defendant should have been allowed to cross-examine the witnesses of the plaintiff. It seems that the aforesaid points were not canvassed before the appellate Judge. However, in the facts and circumstances of the case, I think that the petitioner deserves to be given an opportunity of adducing his evidence. In fact, the order of the trial court in not allowing the defendant to cross-examine the witnesses of the plaintiff is clearly bad in law. At least, even by imposing costs, the defendant should have been allowed to cross-examine the witnesses of the plaintiff. Mr.Shah submits, on instructions, that the entire rent has been paid up by the tenant and even if it is not cleared up, within a period of two months from today, whatever be the arrears, the petitioner will deposit the entire rent before the trial court. In that view of the matter, the case is required to be remanded to the trial court with an observation that the trial court may allow the petitioner-defendant to cross-examine the witnesses of the plaintiff and the defendant is also permitted to lead his own evidence on the aforeaid question of arrears of rent as well as on the question of sub-letting.

The matter is accordingly remanded to the trial court. The judgment passed by the learned appellate Judge, confirming the decree passed by the learned trial Judge is accordingly set aside. The trial court, i.e. the learned Civil Judge (S.D.), Bhavnagar, will proceed with the suit from the aforesaid stage by allowing the defendant to cross-examine the plaintiff's witnesses as well as for the purpose of allowing the defendant to adduce his own evidence, both oral as well as documentary, if any. Since the proceedings are very old, the trial court is directed to dispose of the suit, i.e. Regular Civil Suit No. 50 of 1979, on or before 31st January, 2001.

The Revision Application is accordingly allowed to the aforesaid extent. Rule is made absolute with no order as to costs.

Writ of this order may be sent to the trial court for compliance.
R & P to be sent back forthwith.

(P.B. Majmudar, J.)

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(apj)